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No. 82-844

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,

Petitioner,

vs.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. On appeal from the District Court's denial of petition for writ of habeas corpus: where the Court of Appeals reversed, ruling that the State's reclassification of perjury from a misdemeanor to a felony, after commission of the act for which petitioner was charged, violated his federal constitutional rights under the *ex post facto* clause* because of adverse collateral consequences accruing to felonies but not to misdemeanors, did the Court of Appeals correctly further determine:

(A) that while the said retroactive transformation as to the nature of the offense violated the *ex post facto* clause, the resultant extension of the statute of limitations—a direct consequence of the said reclassification—was nonetheless constitutionally permissible?

(B) that the conviction itself need not be vacated, ruling the sufficient remedy for the *ex post facto* violation was to remand to the District Court with instructions that the cause be remanded to the state court for resentencing under the law in effect at the time of the offense—though petitioner had elected not to be sentenced thereunder?

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* "We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause." (App. A, p. 5; Sl. Op. p. 5).

2. In reaching these results upon the undisputed facts, did the Seventh Circuit misconstrue and misapply *Weaver* v. *Graham*, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that decision?

PARTIES INVOLVED (per rule 21.1(b))

Petitioner, Benedetto J. Massarella, was the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the Court of Appeals for the Seventh Circuit. Respondents, Richard J. Elrod (Sheriff of Cook County, Illinois) and Tyrone Fahner (Attorney General of Illinois) were respondents in the District Court, and appellees in the Court of Appeals.

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The decision below—that although the collateral consequences of reclassification of perjury from a misdemeanor to a felony render defendant's conviction violative of the *ex post facto* clause, his conviction need not be vacated, but he must be resentenced—emasculates the federal constitutional provision, considering that: (a) this results in defendant being sentenced under the law he elected, at trial-time, *not* to be sentenced under, and (b) extension of the statute of limitations—but for which, defendant could not have been prosecuted at all—was a direct adverse consequence of the said unconstitutional reclassification, such that the conviction itself, not merely the sentence, should be nullified.

Certiorari should be allowed so that this Court may express itself as to whether extension of the statute of limitations, as adjunct to an admittedly unconstitutional retroactive transformation of an offense from

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misdemeanor to felony, is therefore an exception to the usual "rule" that extensions of statutes of limitation are "merely procedural" and, as such, do not violate the *ex post facto* clause.

Certiorari should also be allowed so Your Honors may consider whether the decision below has misconstrued and misapplied *Weaver* v. *Graham*, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that case 8

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NO.

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,
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VS.

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Benedetto J. Massarella (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision reversing the District Court's order denying his Petition for a Writ of Habeas Corpus and remanding with certain directions, specifically, that he be resentenced by the State court pursuant to the law existing at the time of the offense.

Judgment and Opinion Below

The Opinion of the Court of Appeals for the Seventh Circuit, No. 81-1571, not yet published, is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On July 14, 1982, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendant's timely Petition for Rehearing was denied on September 23, 1982. (App. B) This petition to review the judgment of a federal court of appeals in a civil case is timely filed within 60 days after denial of petition for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Sec. 9, cl. 3, United States Constitution, provides:

> "No ex post facto Law shall be passed."

Article I, Sec. 10, cl. 1 of the United States Constitution provides:

> "No State shall . . . pass any . . . ex post facto Law, . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty or property, without due process of law . . ."

The Illinois statutes involved in this cause are:

Chapter 38, Sec. 3-5, Ill. Rev. Stat. 1963:

GENERAL LIMITATIONS

(a) A prosecution for murder, manslaughter, treason, arson, or forgery may be commenced at any time.

(b) Unless the statute describing the offense provides otherwise, or the period of limitation is extended by Section 3-6, a prosecution for any offense not designated in Subsection (a) must be commenced within 3 years after the commission of the offense if it is a felony, or within one year and 6 months after its commission if it is a misdemeanor.

Chapter 38, Sec. 32-2, Ill. Rev. Stat. 1969:

PERJURY

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

• • •

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

Chap. 38, Sec. 32-2, Ill. Rev. Stat. 1973:

PERJURY

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

• • •

(d) Sentence.

Perjury is a Class 3 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

STATEMENT OF THE CASE

Nature of the Case

Petitioner, Benedetto J. Massarella (hereafter, defendant) was found guilty by an Illinois State court jury of theft and perjury for which he was sentenced to 5 years' probation, including 2 years' periodic imprisonment, for theft, and 1 to 3 years' imprisonment for perjury, the sentences to run concurrently. A fine and a restitution order also were imposed.[1]

After exhausting his State remedies,[2] defendant filed a Petition pursuant to 28 U.S.C. 2254, requesting a writ of

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[1] The appeals court was unable to determine from the present record, including the State court opinions, what fine was imposed for what offense. (See App. A, p. 2 & fn. 1; Sl. Op. p. 2 & fn. 1) For the Court's information, a $10,000 fine was part of the sentence imposed on the perjury charge. (State Court Record, R. 337)

[2] On defendant's original appeal, the Appellate Court agreed that the indictment should have been dismissed due to improper participation of the Attorney General, and reversed without deciding the remaining issues. *People* v. *Massarella*, 53 Ill.App.3d 774, 10 Ill. Dec. 912, 368 N.E.2d 507 (1 Dist. 1977). The Illinois Supreme Court allowed the State's petition for leave to appeal, reversed that decision, and remanded to the Appellate Court for resolution of the remaining issues. *People* v. *Massarella*, 72 Ill.2d 531, 21 Ill.Dec. 898, 382 N.E.2d 262 (1978).

In its second opinion, the Appellate Court resolved all issues against defendant, *People* v. *Massarella*, 80 Ill.App.3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1 Dist. 1979). Leave to appeal was denied by the Illinois Supreme Court, and this Court denied defendant's petition for certiorari.

Meanwhile, while the instant habeas proceedings were pending in federal court, petitioner filed in the State trial court a Petition

(footnote continued)

habeas corpus.[3] The District Court granted respondents' motion to dismiss on the pleadings, denied the petition, (App. C), and issued a certificate of probable cause, permitting defendant to appeal.

The Court of Appeals for the Seventh Circuit reversed and remanded "for action not inconsistent with this opinion,"[4] that is, with directions that the District Court (1) determine whether defendant was fined $10,000 for perjury,[5] and (2) remand to the state court " 'to permit the

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(footnote continued)
to Quash Penitentiary Mittimus, treated by the court as a Petition under the Illinois Post-Conviction Hearing Act, Chap. 38, sec. 122 et seq., Ill. Rev. Stat. The court denied the motion; defendant's appeal is pending in the Illinois Appellate Court, No. 82-1348. Its current status is: petitioner-defendant-appellant has filed his Brief; Respondent-appellee has moved to dismiss the appeal on grounds that the intervening decision by the Seventh Circuit [in the instant cause] has rendered the State appeal moot. Having responded thereto per order of the appellate court, we await that court's decision.

In keeping with the judicial philosophy expressed in the concurring opinions in *Marino* v. *Ragen*, 332 U.S. 561, 564, 565, 570, 92 L.Ed. 170, 173, 174, 176 (1947), we include material from this pending State appeal as and where pertinent to the progress of the instant federal proceedings. See fn. 8, *infra*.

[3] In his habeas petition, defendant contended that the perjury conviction was obtained in violation of the *ex post facto* prohibition of the Constitution, and that all the convictions were constitutionally void for various Sixth Amendment violations involving improper limitations on cross-examination and of presentation of defense evidence. Only the *ex post facto* aspect of the case is pressed herein.

[4] App. A, p. 6; Sl. Op. p. 5.

[5] "If so, this fine would be, under the principles noted [in the Seventh Circuit's opinion] above, be an *ex post facto* violation." (App. A, p. 6; Sl. Op. p. 5) See fn. 1, *supra*.

state court to apply, if possible, the law in place when the crime occurred.' "[6]

Jurisdiction of the Trial Court

Jurisdiction in the court of first instance is based on 28 U.S.C. 2241 & 2254, empowering the District Courts to issue writs of habeas corpus.

Statement of Facts

The underlying facts appear in the Appellate Court's first opinion, 53 Ill.App.3d at 775-76, 10 Ill.Dec. at 913-14, 368 N.E.2d 508-09, and are not repeated here to avoid unnecessary duplication. Specific facts as to each of the issues decided in that court's second opinion—including the *ex post facto* issue—are discussed therein. See 36 Ill.Dec. at 22, 400 N.E.2d at 442.

Specific procedural facts pertaining to ex post facto issue

Defendant was indicted (in Count 3) for perjury on the basis of statements made between August 26, 1971 and August 30, 1971. The Illinois statute then prescribing the penalty for perjury was Chap. 38, sec. 32-2, Ill.Rev.Stat. 1969. (See Illinois Appellate Court's second opinion, *supra*, 36 Ill.Dec. at 22, 400 N.E.2d at 442; see App. A, pp. 2-3; Sl. Op. p. 2.) Under Illinois law, in 1971, perjury was classified as a misdemeanor, due to the alternative penalty of imprisonment other than in the penitentiary. *Ibid.*

The indictment here in question was returned June 8, 1973, beyond the 18-month period of limitations for a mis-

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[6] App. A, p. 6; Sl. Op. p. 5. Quoting from *Weaver* v. *Graham*, 450 U.S. 24, 36-37 n.22, 67 L.Ed. 17, 28-29, n.22 (1981).

demeanor,[7] approximately 22 months after the alleged perjury. About a month before the 1971 18-month limitation period expired in February 1973, Illinois' Unified Code of Corrections took effect on January 1, 1973. Under the new Code, perjury is a Class 3 felony, Chap. 38, Sec. 32-2, Ill. Rev.Stat. 1973, with a statute of limitations of 3 years. Chap. 38, sec. 3-5, Ill.Rev.Stat. 1973. (See App. A, pp. 2-3; Sl. Op. 2-3.)

Defendant's motion to dismiss Count 3 on grounds it was barred by the Statute of Limitations, (R. 104,[8] pars. 1 & 21), was denied by the trial court. (R. 134-35, 261-62) In its second opinion, *supra,* the Illinois Appellate Court affirmed. The federal District Court dismissed defendant's petition for a writ of habeas corpus, and the Seventh Circuit reversed and remanded for further proceedings, rejecting the statute of limitations argument but concluding that due to collateral consequences accruing to felonies but not to misdemeanors, reclassification of the offense violated the *ex post facto* clause, requiring that defendant be resentenced under the law in effect at the time of the offense. (App. A)

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[7] See Chap. 38, sec. 3-5, Ill.Rev.Stat. 1963, set out at pp. 2-3, *supra.*

[8] "R." refers to the Record on Appeal in the state court, and "Tr." to the Transcript of Proceedings at trial; references to the state post-conviction petition and defendant's appeal from denial thereof—not of record herein—will be alluded to as appropriate with the prefix, "PC". See fn. 2, *supra.* The Record in the instant cause—that is, the appeal from the District Court's dismissal of the habeas petition—consists mainly of the Petition; the said Record will not be cited by page references herein.

REASONS FOR GRANTING THE WRIT

The decision below—that although the collateral consequences of reclassification of perjury from a misdemeanor to a felony render defendant's conviction violative of the ex post facto clause, his conviction need not be vacated, but he must be resentenced—emasculates the federal constitutional provision, considering that: (a) this results in defendant being sentenced under the law he elected, at trial-time, not to be sentenced under, and (b) extension of the statute of limitations—but for which, defendant could not have been prosecuted at all—was a direct adverse consequence of the said unconstitutional reclassification, such that the conviction itself, not merely the sentence, should be nullified.

Certiorari should be allowed so that this Court may express itself as to whether extension of the statute of limitations, as adjunct to an admittedly unconstitutional retroactive transformation of an offense from misdemeanor to felony, is therefore an exception to the usual "rule" that extensions of statutes of limitation are "merely procedural" and, as such, do not violate the ex post facto clause.

Certiorari should also be allowed so Your Honors may consider whether the decision below has misconstrued and misapplied Weaver v. Graham, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that case.

Introduction

In a *sui generis* opinion, the Seventh Circuit, while agreeing with defendant that his perjury conviction violates the *ex post facto clause,* nonetheless has remanded for resen-

tencing under the provisions in existence at the time of the offense. While we maintain that the conviction itself is void for the constitutional violation, even if one concedes *arguendo* that alteration of the sentence could, in the abstract, remedy such a violation, in *this* case, to apply "the law in place when his crime occurred," (App. A, p. 6; Sl. Op. p. 5), would be to sentence defendant under the very law under which he elected *not* to be sentenced. (App. A, p. 4; Sl. Op. p. 3, text accompanying fn. 3.)

How can this Court countenance that defendant be sentenced under the law under which he elected *not* to be sentenced, as a result of having successfully challenged his conviction? Does this not conflict with the most rudimentary constitutional notions of due process of law?

In effect, this hybrid, nay, mongrel, end result permits the State to have its proverbial cake and eat it, too. Certiorari is appropriate so that this Court may properly decide the seminal issue, which doubtless will have far-reaching effects in other *ex post facto* cases yet to come; that is, how to remedy the constitutional violation which admittedly occurred in this case. In light of defendant's trial-time election, it appears that the remedy suggested by Your Honors in the vastly different factual situation presented by *Weaver* v. *Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981), quoted and exclusively relied on by the Seventh Circuit (App. A, pp. 5-6; Sl. Op. p. 5), is utterly inappropriate and unconstitutional in this case.

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Moreover, though the reviewing court agrees an *ex post facto* violation occurred, it so holds only with respect to reclassification of the offense, (App. A, pp. 4-5; Sl. Op. pp. 3-5), not with respect also to the extension of the statute of limitations so as to permit prosecution *at all* within

the time-sequence of events at bar. (App. A, pp. 2-3; Sl. Opp. pp. 2-3) We urge the grant of certiorari to decide the full scope of defendant's *ex post facto* argument; a more sensible, not to mention, constitutional, approach would vacate the perjury conviction in its entirety and would avoid the "difficult" resentencing imbroglio. (See App. A, p. 5; Sl. Op. p. 5.)

Pursuant to this Court's laudable standards for determining which cases to hear by way of the rarely-granted, discretionary writ, certiorari should be allowed.

The "end result" of the decision below on the ex post facto issue—that is, that defendant be resentenced under the "old law"—does not go far enough to vindicate defendnt's federal constitutional rights.

The perjury conviction should be vacated, because on the facts, extension of the statute of limitations—based on the admittedly unconstitutional retroactive transformation of the offense from misdemeanor to felony—unconstitutionally subjects defendant to ex post facto legislation.

The decision to resentence defendant under the "old law" makes inappropriate and unconstitutional use of Weaver v. Graham, directing that he be sentenced contrary to a binding election he was required to make in the state trial court, in further violation of his constitutional rights.

In the State courts[9] and in these federal habeas proceedings, defendant has argued throughout, not only that his felony conviction for perjury violates the *ex post facto* clause because of adverse collateral consequences inherent

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[9] See Statement of Facts, fn. 2, pp. 2-3, *supra*.

in the reclassification of the offense[10] from a misdemeanor to a felony,[11] but also that the extension of the statute of limitations—a *direct* consequence of the said (now, judicially dubbed) unconstitutional reclassification[12]—so as to permit his prosecution for perjury *at all*, violates the *ex post facto* clause as well.

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[10] See App. A, pp. 3-4; Sl. Op. pp. 3-4, & p. 4 fn. 4. In addition to what the Seventh Circuit opines concerning the unconstitutionality of imposing adverse collateral consequences after the fact, *ibid.*, this Court has held, in no uncertain terms, that such disabilities respecting licensing provisions are judicially cognizable "collateral consequences" of a conviction. *Sibron* v. *New York*, 392 U.S. 40, 54 n.14, 20 L.Ed.2d 917, 930 n.14 (1968); *Ginsberg* v. *New York*, 390 U.S. 629, 633 n.2, 20 L.Ed.2d 195, 200 n.2 (1968). Nor are such expressions of recent origin. For similar holdings specifically concerning the *ex post facto* prohibition's applicability over and above the simple question of sentence length, see *Cummings* v. *Missouri*, 71 U.S. 277, 18 L.Ed. 356 (1867), and *Ex Parte Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867), both holding invalid, provisions disqualifying one from holding certain offices or practicing specific professions on the basis of acts already proscribed, where the disqualification was not enacted until after commission of the act.

[11] In typical "have its cake and eat it, too" fashion, see p. 9, *supra*, the State attempted to convince the Seventh Circuit that, almost magically, "Massarella does not now stand convicted of a felony," (App. A, p. 5; Sl. Op. p. 4), although "For determining the period of limitation on Massarella's perjury prosecution, the state unquestionably classed the offense a felony." *Ibid.*

[12] "[T]he state has pointed to nothing to show that Massarella will not suffer the collateral consequences [accruing to felonies] of which he complains. We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause." (App. A, p. 5; Slip Op. pp. 4-5)

The Court of Appeals' determination that extension of the limitations period—a result which was a direct consequence of the reclassification—does not run afoul of the Constitution, (App. A, pp. 3-4; Sl. Op. p. 3), does violence to law, logic, and defendant's rights. Even if, in the abstract, extension of a limitations period does not necessarily violate the *ex post facto* prohibition,[13] on the facts of *this* case, such extension *does* violate that prohibition. Having decided that reclassification of the offense to a felony was constitutionally barred because of adverse consequences accruing to felonies but not to misdemeanors, (see nn. 10 & 12, *supra*), rationally the court should have concluded further that, since extension of the limitations period—undisputedly, a product of the reclassification—was just such an adverse consequence, the extension, too—but for which the perjury offense could not have been prosecuted—violated defendant's right not to be subjected to *ex post facto* legislation. Since in *this* case, extension of the limitations period was not just an isolated legal act, but rather, was a direct consequence of the admittedly unconstitutional reclassification, this consequence, too, must be prohibited by the *ex post facto* clause.

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[13] See App. A, p. 3; Sl. Op. p. 3, where the Seventh Circuit states:

> "Extending a limitation period *before* a given prosecution is barred does not violate the *ex post facto* clause." (Emphasis in original.)

The Court cites and relies on *Clements* v. *United States*, 266 F.2d 397, 399 (9 Cir. 1959), also relying on *Weaver* v. *Graham*, *supra*, in excluding "merely procedural" changes from *ex post facto* applicability. (App. A, pp. 3-4; Sl. Op. pp. 3-4)

Any post-conduct change in the law which is more burdensome to a defendant[14] or which operates to his disadvantage[15]—over and above sentencing considerations—is an *ex post facto* law barred by the Constitution.[16]

Here, reclassification of the offense subjected defendant to a harsher penalty; the possible minimum sentence was thereby increased. When perjury was a misdemeanor, it was within the court's discretion to impose a sentence as miniscule as a day in jail or a one-cent fine; while as a felony, if a sentence of incarceration was imposed, it had to be at least 366 days.[17] By thus increasing the possible minimum incarceration sentence, the reclassification renders unconstitutional the entire statutory scheme as applied to defendant. *Lindsey* v. *Washington*, 301 U.S. 397,

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[14] *See Dobbert* v. *Florida*, 432 U.S. 282, 292, 53 L.Ed.2d 344, 356 (1977), quoting with approval from *Beazell* v. *Ohio*, 269 U.S. 167, 169-70, 70 L.Ed. 216, 217 (1925).

[15] See *Kring* v. *Missouri*, 107 U.S. 221, 235, 27 L.Ed. 506, 511 (1882), quoting *United States* v. *Hall*, 26 Fed. Cas. No. 15,285, p. 84, 2 Wash. (C.C.) 366, *aff'd*, 10 U.S. (6 Cranch) 171, 3 L.Ed. 189 (1810), quoted and relied on in *Geraghty* v. *United States Parole Comm'n*, 579 F.2d 238, 264 (3 Cir. 1978).

[16] "[The following kinds of laws are] *ex post facto* laws within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which innocent when done, criminal; and punishes such action. 2d. *Every law that aggravates a crime, or makes it greater than it was, when committed.* 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence . . . in order to convict the offender." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648, 650 (1798). (Emphasis added.)

[17] See App. A, p. 3; Sl. Op. p. 2 & fn. 2.

402, 81 L.Ed. 1182, 1186 (1937) (*ex post facto* clause "looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed.").[18]

Because of these factors over and above the collateral consequences (license limitations, civil rights, etc.) recognized by the Seventh Circuit, which accrue to felonies as opposed to misdemeanors—that is, extension of the statute of limitations, and the subjection of defendant to a greater minimum sentence—the court's decision that defendant be resentenced under the old law is unconstitutional.

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The Seventh Circuit's decision to order defendant resentenced under the law in effect at the time of the offense is further erroneous and unsatisfactory for two additional, independent reasons, each of which should pique the interest of the Court. As is more fully hereafter elaborated:

First, in reaching this unique and unsupportable conclusion, the court has relied upon inapposite authority which, on closer scrutiny, redounds to defendant's benefit. More precisely, the court's reliance upon *Weaver* v. *Graham, supra,* as its sole authority supporting the resentencing aspect of the opinion, puts Your Honors' recent decision therein to unsuitable and unconstitutional use which we are confident this Court will be eager to condemn.

Secondly, this selection of remedy places defendant in the constitutionally impermissible position of being resentenced under the very law he had elected not to be sen-

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[18] See also *People* v. *Wyckoff,* 106 Ill.App.2d 360, 245 N.E.2d 316 (2 Dist. 1969) (amendment increasing possible minimum sentence, invalid as *ex post facto* law).

tenced under, when made to choose in the trial court. (See Tr. 2295-97, 2302.)

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While acknowledging that "The matter of remedies is a difficult one in this case," (App. A, p. 5; Sl. Op. p. 5), the court rejects defendant's argument that the conviction is wholly invalid and should be vacated, directing that he be resentenced under the old law, on the basis of the following authority, set out herein in its entirety:

> "Massarella seeks an unconditional writ that would have the effect of vacating his perjury conviction. The Supreme Court, however, has noted that '[t]he proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when the crime occurred.' *Weaver* v. *Graham*, *supra*, 450 U.S. at 36-37 n.22." (App. A, pp. 5-6; Sl. Op. p. 5)

However, as Your Honors well know, *Weaver* does *not* involve a sentencing determination; rather, it deals solely with the method of computing "good time" while in prison. *Weaver* v. *Graham* held that the revised law, resulting in more lengthy incarceration than the prior law, was "void as applied to petitioner, whose crime occurred before its effective date." 450 U.S. at 36, 67 L.Ed.2d at 28. It is one thing to compute "good time" in accordance with one formula or another; it is quite another to apply judicial sentencing discretion under two vastly different laws. *Weaver*'s footnote 22, quoted and exclusively relied on by the Seventh Circuit, should not be deemed controlling on the admittedly "difficult" matter of remedies.

Nor do the cases cited in the *Weaver* footnote support the decision below. Both *Lindsey* v. *Washington*, *supra*, and *Ex Parte Medley*, 134 U.S. 160, 33 L.Ed. 835 (1890),

hold that whether the "old" law still may be imposed after the Court had determined the "new" law was void for violation of the *ex post facto* clause, is a question of State law for the State courts. As the Court put it in *Medley*—a capital case wherein the result in defendant's favor not only relieved him of the supreme penalty but even ordered his discharge from custody:

> "[I]t is apparent that while the Statute under which he is now held in custody is an *ex post facto* law in regard to his offense, *it repeals the former law*, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted on by the court below, and it is neither our inclination nor our duty to decide what the [state] court may or what it may not do in regard to the case as it stands." *Id.* at 174, 33 L.Ed. at 841. (Emphasis added.)

Applying this rationale to the case at bar, the passage of the new law operated to repeal the old law, so that it is not now possible to sentence Massarella under the old law.

Secondly, defendant was made to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97; 2303) He chose the new law.[19] (See App. A,

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[19] Defendant's election is the subject of one aspect of the still-pending State post-conviction proceedings. See nn. 2 & 8, *supra*. Adding to the tangled web concerning remedies, the Appellate Court in its second opinion hinged its ultimate conclusion on the *ex post facto* issue against defendant upon its perception that defendant had made a valid election to be sentenced under the new law: "Massarella elected to be sentenced under the Unified Code of Corrections." 36 Ill.Dec. at 22, 400 N.E.2d at 442. In denying the post-conviction petition, the trial court specifically held that the Appellate Court's second opinion was *res judicata*, (PC R. 19-20), and stressed that defendant did not claim a right or desire to be sentenced under the old law. (PC R. 19)

p. 4; Sl. Op. p. 3, & fn. 3.) The decision below, requiring that he be resentenced under the old law, cannot be implemented without doing grave violence to defendant's most basic constitutional rights as embodied in the concept of due process of law. Although the court admonishes that no "more onerous sentence" be imposed, (App. A, p. 6; Sl. Op. p. 5), the constitutionally-required standard, of course, is not the sentence actually imposed, but rather, that which theoretically could be imposed. *Lindsey* v. *Washington, supra,* 301 U.S. at 402, 81 L.Ed. at 1186.

• • •

The Seventh Circuit's decision acknowledges the *ex post facto* infirmity of the proceedings, particularly in stating that, if defendant was fined $10,000 for his perjury conviction,[20] "this fine would, under principles noted above, be an *ex post facto* violation." (App. A, p. 6; Sl. Op. p. 5) It makes no sense to attempt to salvage, in piecemeal fashion, this unconstitutionally wrought conviction which is defective in each of the aspects elaborated above.

• • •

The Court should be loathe to permit this convoluted and confusing decision, diluting and emasculating the *ex post facto* prohibition, to stand as the law of the land.[21]

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[20] As he was. See fn. 1, *supra;* R. 337.

[21] Unlike many Court of Appeals' decisions, which, per local Rule, remain buried in the unpublished annals as non-precedential cases known only to the parties, (see Seventh Circuit Rule 35), the instant decision was promulgated as an opinion which, in the normal course of events, will wend its way into the federal reporter system [F.2d]; a foregone future fact which, we submit, should weigh in the preliminary decision this Court must make—whether to select this case for determination on certiorari.

Certiorari should be allowed for a rational resolution of the serious and meritorious constitutional questions raised in these proceedings—especially considering the contextual misuse to which *Weaver* v. *Graham* so tortuously has been put. This case is an excellent vehicle whereby Your Honors can explicate *ex post facto* issues of far-reaching import within the criminal justice system beyond the factual scope of the situation presented by *Weaver*. The Court should welcome the opportunity to deal with the questions posed by this case.

CONCLUSION

For any or all of the foregoing reasons, the Petition for Certiorari should be allowed. And, on the merits, the Seventh Circuit's order should be reversed and the cause remanded to the District Court with instructions to vacate defendant's conviction and grant the Great Writ.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1571

UNITED STATES OF AMERICA ex rel. BENEDETTO J. MASSARELLA,

Petitioner-Appellant,

v.

RICHARD J. ELROD, Sheriff of Cook County, Illinois and TYRONE FAHNER, Attorney General of Illinois,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois.
No. 81 C 1752—Nicholas J. Bua, *Judge.*

Argued January 15, 1982—Decided July 14, 1982

Before CUDAHY, *Circuit Judge,* PECK* and FAIRCHILD,

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* Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

Senior Circuit Judges.

PECK, *Senior Circuit Judge.* Massarella appeals from the denial of his petition for a writ of habeas corpus. He raises numerous issues on appeal, but only one is of moment. That issue is whether Massarella's conviction of the felony of perjury in Illinois' courts violated the *ex post facto* clause of the Federal Constitution. U.S. Const. art. I §10, cl. 1.

The facts of Massarella's case are cited in detail in *People* v. *Massarella,* 400 N.E. 2d 436 (Ill. App. 1979) *cert. denied, Massarella* v. *Illinois,* 449 U.S. 1077 (1981), and will be stated only briefly here. In 1973 an Illinois jury found Massarella guilty of conspiracy, theft, and one count of perjury. He was sentenced to five years' probation, including two years' periodic imprisonment, for the theft, and one to three years' imprisonment for the perjury. The sentences were to run concurrently. Massarella was also fined, but the present record is not clear on the total amount, nor on the offenses for which fines were imposed.[1]

The history of Massarella's perjury conviction is a convoluted one. Massarella was indicted on June 8, 1973, for statements made around August 30, 1971. At the time of the commission of the perjury, the offense was an "indictable misdemeanor," punishable as either a misdemeanor

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[1] *People* v. *Massarella,* 368 N.E. 2d 507, 508 (Ill. App. 1977) reports $10,000 fines for both the theft and perjury convictions. The Illinois Supreme Court, reversing, noted only one $10,000 fine, but did not tie it to any offense. See 382 N.E. 2d 262, 263 (Ill. 1978). On remand, the Illinois Court of Appeals noted only one fine imposed on Massarella individually. See 400 N.E. 2d 436, 441 (Ill. App. 1979).

or a felony. See Ill. Rev. Stat. ch. 38, § 32-2 (1969).[2] At the time of Massarella's indictment, the offense was a "pure" felony. See Ill. Rev. Stat. ch. 38, § 32-2 (1973). The change was effected by the Illinois Unified Code of Corrections, which, Massarella argues, also extended the limitation period for prosecution of perjury from eighteen months to three years. The extension took effect in January of 1973, approximately one month before the former eighteen month statute would have barred Massarella's perjury prosecution. (Massarella was not indicted until about twenty-two months after the perjury was committed.) In this appeal, Massarella argues that, as applied to his case, both the extension of the limitations period and the reclassification of the perjury from "indictable misdemeanor" to felony violate the *ex post facto* clause of the Constitution.

Massarella's objection to the enlargement of the limitation period has no merit. Extending a limitation period *before* a given prosecution is barred does not violate the *ex post facto* clause. *Clements* v. *United States*, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959). As

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[2] An indictable misdemeanor is a relatively new type of offense, created over the last decade or two in connection with new types of criminal conduct, as to which conduct the legislature appears to wish to give the State and/or trial judge a broad discretion in respect of penalty, ranging from the felony penalties of imprisonment in the State penitentiary for more than one year and/or a fine, to the misdemeanor penalties of imprisonment in a correctional institution other than the penitentiary for not more than one year and/or a lessor [sic] fine. *People* v. *Houston*, 315 N.E.2d 192, 195 (Ill. App. 1974), *cert. denied*, *Houston* v. *Illinois* 420 U.S. 936 (1975).

the Supreme Court recently noted, "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981), *quoting Hopt* v. *Utah*, 110 U.S. 574, 590 (1884). The extension of the statute of limitations in this case was just such a "merely procedural" change.

The reclassification of the offense is more troublesome. The state argues that the reclassification was merely nominal, since Massarella, as the new Unified Code required, was permitted to choose between being sentenced under the Unified Code or under the law as it stood at the commission of the perjury. Massarella rationally chose to be sentenced under the later law, which set a higher fine but a lower maximum prison sentence for perjury.[3] He now contends that the reclassification of the offense, apart from direct changes in possible sentences, created a host of adverse collateral consequences.[4] that fall on a convicted felon. Whether this retrospective reclassification worsens the conditions imposed under the former state law is a federal question. See *Weaver* v. *Graham, supra*, 450 U.S. at 33; *Lindsey* v. *Washington*, 301 U.S. 397, 400 (1937). In this case, however, it is a question involving numerous and subtle issues of state law.

It is not at all clear that Illinois would not have considered Massarella a felon had he been convicted of perjury in 1971. In 1971 in Illinois, perjury was punishable

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[3] The state does not argue that this choice constituted a waiver of any of Massarella's rights under the *ex post facto* clause.

[4] These consequences include: ineligibility for state elective office, Ill. Rev. Stat. ch. 38, § 1005-5-5 (1973); longer curtailment of voting rights, Ill. Const. art. III, § 2 (1970); and disqualification from holding numerous licenses.

with a penitentiary sentence. Ill. Rev. Stat. ch. 38, § 32-2 (1969). Under a literal reading of the statutes then in force, the offense was thus a felony. *Id.* § 2-7. On this appeal, however, the state argues that Massarella now stands convicted of a misdemeanor, apparently conceding that the offense was so classed under former law, at least for the purpose of determining the collateral consequences of a perjury conviction.

We must, however, reject the state's argument that, by operation of a state statutory provision concerning the application of the Uniform Code of Corrections,[5] Massarella does not now stand convicted of a felony. For determining the period of limitation on Massarella's perjury prosecution, the state unquestionably classed the offense a felony. See Ill. Rev. Stat. ch. 38, § 3-5; *id.* § 32-2 (1973). Yet after conviction, the state argues a different *classification* of the offense from statutes dealing only with *punishment* of the offense. In short, the state has pointed to nothing to show that Massarella will not suffer the collateral consequences of which he complains. We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause.

The matter of remedies is a difficult one in this case. Massarella seeks an unconditional writ that would have the effect of vacating his perjury conviction. The Supreme Court, however, has noted that "[t]he proper relief upon a conclusion that a state prisoner is being treated

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[5] Ill. Rev. Stat. ch. 38, § 1008-2-4 (1973), provides that *sentences* under the Uniform Code apply "if they are less than under the prior law upon which the prosecution was commenced." The provisions of the Code are severable, should individual ones be held invalid. *Id.* § 1008-4-1.

under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred." *Weaver* v. *Graham, supra,* 450 U.S. at 36-37 n.22. (Citing *Lindsey* v. *Washington, supra,* 301 U.S. at 402.) In so remanding, we are confident that there is little need to point out the constitutional pitfalls of imposing on Massarella any more onerous sentence than he originally received.

Before remanding to the state court, however, the district court should resolve the fact question whether Massarella was fined $10,000 for his perjury conviction. If so, this fine would, under the principles noted above, be an *ex post facto* violation.

We have fully considered Massarella's other arguments and hold that none establishes errors for which habeas corpus relief is appropriate. The judgment of the district court is reversed, and the case remanded for action not inconsistent with this opinion.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 23, 1982.

Before
Hon. Richard D. Cudahy, Circuit Judge
Hon. John W. Peck, Senior Circuit Judge*
Hon. Thomas E. Fairchild, Senior Circuit Judge

UNITED STATES OF AMERICA ex rel.
BENEDETTO J. MASSARELLA,
Petitioner-Appellant,

No. 81-1571 vs.

RICHARD J. ELROD, Sheriff of Cook County, Illinois
and TYRONE FAHNER, Attorney General of Illinois,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 1752—Nicholas J. Bua, *Judge.*

---

* The Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals is sitting by designation.

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *in banc* filed by the Respondent-Appellees and by the Petitioner-Appellant.

On consideration of the petitions, all members of the original panel having voted to deny a rehearing, and no judge in regular active service having requested a vote thereon, accordingly,

It Is Ordered that the aforesaid petitions for rehearing be and the same are hereby, Denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA
ex rel. BENEDETTO J. MASSARELLA,

Petitioner,

No. 81 C 1752 vs.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Respondents.

Before the Honorable
Nicholas J. Bua, *Judge*
United States District Court

ORDER

Presently before the court is Massarella's petition for a writ of habeas corpus. 28 U.S.C. § 2254. At a hearing on respondents' motion to vacate this court's April 1, 1980 Order setting bond, the parties agreed to submit the questions raised by the petition on the basis of the facts contained in their respective memoranda of law. The petition presents four grounds for relief.

The first issue raised by the petition is whether the application of Ill. Rev. Stat. ch. 38 § 32-2 (1973) to petitioner violated the constitutional ban on state *ex post facto* laws. U.S. Const., Art. 1, § 10, cl. 1.

The petitioner was convicted of perjury for statements made between August 26, 1971 and August 30, 1971. He was indicted for violating Ill. Rev. Stat. ch. 38 § 32-2. Under the 1971 version of the statute, in effect at the time the crime was committed, the petitioner could have been imprisoned in another penitentiary. Illinois courts had construed the statute as a misdemeanor because of this provision. *Cf. People* v. *Novotny*, 41 Ill. 2d 401, 244 N.E. 2d 182 (1968). The indictment was returned on June 8, 1973, beyond the 18 month limitation period applicable to a misdemeanor at the time the crime was committed. Ill. Rev. Stat. ch. 38 § 3-5. On January 1, 1973, one month before the limitations period for petitioner's crime would have expired, Illinois' Unified Code of Corrections took effect. The Unified Code classified perjury as a Class 3 felony with a three year statute of limitations. Ill. Rev. Stat. ch. 38 §§ 32-2, 3-5 (1973). The application of the new statute of limitations does not violate the *ex post facto* clause. *Clements* v. *United States*, 266 F.2d 397, 398 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959); *Roberts* v. *United States*, 239 F.2d 467 (9th Cir. 1957); Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. L.Rev. 1491 at 1512 n.78 (1975).

The petitioner nevertheless argues that the legislative reclassification of perjury from a misdemeanor to a felony violates the *ex post facto* clause. The petitioner maintains that the state trial and appellate courts erroneously focused on the actual sentence imposed on the petitioner rather than the legislative "aggravation" of the offense caused by reclassifying perjury as a felony. *See Calder* v. *Bull*, 2 U.S. 386, 390 (1798) (separate opinion of Chase, J.).

What the petitioner conveniently fails to point out is that the petitioner, with the advice of counsel, chose to be sentenced in accordance with the 1973 version of the

perjury statute. The petitioner correctly quotes *Lindsey* v. *Washington*, 301 U.S. 397 at 401 (1937) for the proposition that

> the *ex post facto* clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed . . . [and] forbids the application of any new punitive measure to a crime already consummated, *to the detriment or material disadvantage* of the wrongdoer. (emphasis added).

However, the petitioner fails to focus on the fact that the import of the ban is the disadvantage imposed upon a wrongdoer without prior notice. The petition conspicuously avoids discussion of the fact that the petitioner had the option of being sentenced under the prior version of the statute. *People* v. *Liebling*, 36 Ill. App. 3d 1973 (1976). It appears that the petitioner must have considered himself benefited by the sentencing regime of the new act or he presumably would have chosen the old one. The respondents' brief in opposition to the petition for a writ of certiorari filed in the United States Supreme Court indicates that the petitioner in fact was given the choice as to which version of the statute he wished to be sentenced under. Thus, *Weaver* v. *Graham*, 49 U.S.L.W. 4155 (February 24, 1981) does not support the petitioner's contention, and this court concludes that his constitutional rights were not violated by the application of the 1973 version of the perjury statute to the petitioner's crime.

The petitioner's second claim is that he was deprived of his constitutional right to present a defense by the trial court's exclusion of certain evidence at trial. *See Chambers* v. *Mississippi*, 410 U.S. 284 (1973). The petitioner attempted to introduce evidence through Milton Lambert as an expert witness qualified by 40 years experience as

a wholesale distributor of motor fuel products. The defense attempted to establish the amount of fuel that the petitioner's business had sold during 1971 by hypothetical questions propounded to Lambert as an expert. The trial court sustained objections to Lambert's testimony based, among other things, upon his lack of personal knowledge, and because hypothetical questions propounded to him were based upon facts not in evidence. Based on the facts contained in the respondents' brief in opposition to the petition for a writ of certiorari filed in the United States Supreme Court, the court finds no deprivation of the petitioner's right to present a defense. The exclusion of Lambert's testimony simply did not materially affect petitioner's ability to present a defense. *Cf. Chambers* v. *Mississippi*, 410 U.S. 284 at 302 (1973).

The petitioner also claims that the trial court's exclusion of evidence pertaining to his conversations with his accountant rises to the level of a constitutional deprivation. According to respondents' brief referred to above, the trial judge sustained a hearsay objection to evidence of the petitioner's statement to his accountant to the effect that the petitioner thought his gross profit margins on motor fuel sales should have been higher in 1969 and 1970. The testimony was apparently offered to show Massarella lacked the intent to commit a theft of state motor fuel taxes. This hearsay exclusion does not constitute a constitutional deprivation under *Chambers, supra.* It certainly cannot be said that the exclusion of such ambiguous evidence was in any sense critical to petitioner's defense.

The third prong of Massarella's claim that he was deprived of due process at trial is based on the contention that the application of the "best evidence rule" to sustain the state's objection to the admission of certain docu-

mentary evidence deprived him of crucial exculpatory evidence. In light of the facts contained in the appendix to respondents' brief at p. 6a, this court believes it frivolous to assert that this evidence was either properly admissible in evidence or crucial to the defense.

The petitioner also maintains that his sixth amendment right to confront the witnesses against him was improperly abridged by the restrictions the trial judge placed upon his counsel's cross-examination of several prosecution witnesses and by its admission of prior testimony given in a civil suit by John Gavin, Sr.

In neither instance does the petitioner's brief allege a single fact from which this court can conclude that his constitutional rights have been violated. The state's brief indicates that the cross-examination of the four witnesses about which petitioner complains fills over two hundred pages of transcript. Absolutely no indication of an abuse of discretion has been presented by the petitioner in alleging that his right to confront and cross-examine the prosecutions' witnesses was unconstitutionally abridged.

Petitioner's contention that the introduction of prior testimony of a deceased witness deprived him of his rights is without foundation. From the briefs of the parties, it is clear to this court that such testimony was properly admitted and did not deprive petitioner of his constitutional right to confront the witnesses against him. *See Dutton* v. *Evans*, 400 U.S. 74.

Finally, we reject as unsupported by any evidence or authority the petitioner's contention that he was deprived of any rights by the manner in which the Illinois Appellate Court disposed of these claims on appeal. *See People* v. *Massarella*, 80 Ill. App. 3d 552, 400 N.E. 436 (1979), *cert. denied*, 49 U.S.L.W. 3493 (1981).

Nothing in the petition supports the claim that the cumulative effect of the evidentiary rulings complained of or the trial judge's supervision of the scope of petitioner's cross-examination of certain prosecution witnesses affected the fundamental fairness of petitioner's trial.

Therefore, the court's order of April 1, 1981 setting bail is vacated, and the petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Nicholas J. Bua
Judge, United States District Court

DATED: April 7, 1981

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

No. 82-844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,
Petitioner,

v.

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an extension of a criminal statutory limitations period from 18 months to 36 months, which took effect before the shorter term had expired, is violative of the *ex post facto* clause.

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In The

Supreme Court of the United States

October Term, 1982

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,

Petitioner,

v.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is appended to the Petition for Writ of Certiorari as Appendix A (*United States ex rel. Massarella v. Elrod, et al.*, 682 F.2d 688 (7th Cir. 1982), and the underlying order of the United States District Court for the Northern District of Illinois is appended thereto as Appendix C (*United States ex rel. Massarella v. Elrod, et al.*, 510 F. Supp. 1082 (N.D. Ill. 1981). In addition, the decision of the Illinois Appellate Court affirming petitioner's convic-

tions for theft and perjury is reported as *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1st Dist. 1979). The Illinois Supreme Court's denial of a Petition for Leave to Appeal is reported at 81 Ill. 2d 586 (1980).

Previously, this Court denied a Petition for Writ of Certiorari to the Illinois Appellate Court filed by this petitioner. *Massarella v. Illinois*, 449 U.S. 1077 (1981).

The petitioner also instituted certain post-conviction collateral proceedings in the Illinois state courts (which he refers to in his Petition at page 4, note 2 and page 16, note 19). Those proceedings terminated with the trial court denying relief and the Illinois Appellate Court dismissing an appeal therefrom in an unreported order.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition for Writ of Certiorari at 2. However, as set forth in the argument portion of this Brief in Opposition, respondents do not believe that petitioner has shown any compelling reason for this Court to grant the requested Writ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

Article I, Sec. 9, cl. 3, United States Constitution, provides that:

> No ex post facto Law shall be passed.

Article I, Sec. 10, cl. 1, of the United States Constitution provides that:

> No State shall . . . pass any . . . ex post facto Law, ...

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Section 1. . . . No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

Statutes:

Illinois Revised Statutes, 1971

Chapter 38, Section 2-7:

> "Felony" means an offense punishable with death or by imprisonment in the penitentiary.

Chapter 38, Section 2-11:

> "Misdemeanor" means any offense other than a felony and includes conduct prohibited by a statute which provides no penalty for its violation.

Chapter 38, Section 3-5:

> (a) A prosecution for murder, manslaughter, treason, arson, or forgery may be commenced at any time.
>
> (b) Unless the statute describing the offense provides otherwise, or the period of limitation is extended by Section 3-6, a prosecution for any offense not designated in Subsection (a) must be commenced within 3 years after the commission of the offense if it is a felony, or

within one year and 6 months after its commission if it is a misdemeanor.

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

Illinois Revised Statutes, 1973

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

* * *

(d) Sentence.

Perjury is a Class 3 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Chapter 38, Section 1005-1-4:

"Conditional Discharge" means a sentence or disposition of conditional and revocable release without probationary supervision but under such conditions as may be imposed by the court.

Chapter 38, Section 1005-5-3:

(a) Every person convicted of an offense shall be sentenced as provided in this Section, except in cases of murder to which Section 5-8-1A of this Code is applicable.

* * *

(d) When a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to:

(1) a period of probation or conditional discharge except in cases of murder, rape, armed robbery, violation of Sections 401(a), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act or violation of Section 9 of the Cannabis Control Act;

(2) a term of periodic imprisonment;

(3) a term of imprisonment;

(4) a fine. However, a fine shall not be the sole disposition in felony cases but may be imposed in such cases only in addition to another disposition under paragraph (d) of this Section.

Chapter 38, Section 1005-7-1:

(a) A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night or for periods of days, or both. Unless the court orders otherwise, the particular times of release shall be determined by the Department of Corrections, the sheriff, or the Superintendent of the house of corrections, who is administering the program.

* * *

(c) The court may impose a sentence of periodic imprisonment for a felony or misdemeanor on a person who is 17 years of age or older. The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant.

(d) A sentence of periodic imprisonment may be for a term up to 2 years, or the longest sentence of imprisonment that could be imposed for the offense, whichever is less. The term of the sentence shall be calculated upon the basis of the duration of its term rather than upon the basis of the actual days spent in confinement.

Chapter 38, Section 1005-8-1:

(a) A sentence of imprisonment for a felony shall be an indeterminate sentence set by the court under this Section.

(b) The maximum term shall be set according to the following limitations:

* * *

(4) for a Class 3 felony, the maximum term shall be any term in excess of one year not exceeding 10 years.

Chapter 38, Section 1008-2-4:

Prosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act. If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced.

Chapter 131, Section 4:

(This statute is presently located in Chapter 1, § 1103 of the 1981 Illinois Revised Statutes, without change.)

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

STATEMENT OF THE CASE

On August 26, 27 and 30, 1971, Benedetto J. Massarella gave false testimony under oath in judicial proceedings which he himself commenced against the Illinois Department of Revenue and some of its employees in the Circuit Court of Cook County, Illinois, for the purpose of enjoining the defendants from continuing a criminal tax investigation of Massarella and his solely owned corporation, Bee Jay's Truck Stop, Inc.

On the dates when he gave false testimony, perjury under Illinois law was an offense that could be punished by a fine and/or a penitentiary term of from one to 14 years, or by incarceration in a penal institution other than a penitentiary for up to one year.[1] The alternative feature of punishment other than incarceration in a penitentiary resulted in the offense being classified a misdemeanor under Illinois law.[2]

In January, 1973, Illinois adopted a Unified Code of Corrections (the "Code") in which perjury was classified a felony.[3] This occurred 16 months after Massarella gave the false testimony. The statute of limitations, both before and after enactment of the Code, was 18 months for misdemeanors and 36 months for felonies.[4]

Massarella was indicted along with several others for conspiracy, perjury, and theft of $425,407 of state motor

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[1] *Ill. Rev. Stat.*, 1971, ch. 38, sec. 32-2.

[2] *People v. Novotny*, 41 Ill. 2d 401, 244 N.E.2d 182 (1968).

[3] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 32-2.

[4] *Ill. Rev. Stat.*, 1971, ch. 38, sec. 3-5; *Ill. Rev. Stat.*, 1973, ch. 38, sec. 3-5.

fuel taxes on June 8, 1973, 22 months after his commission of perjury. He moved to dismiss the perjury charges, alleging that the indictment was returned beyond the 18-month statute of limitations. The trial judge held that the statute had been extended to 36 months before it had run as to Massarella's criminal acts.

Massarella was tried by a jury in 1974, and verdicts of guilty were returned against him for conspiracy, perjury and theft of $425,407 in state motor fuel tax funds. Illinois law requires the merger of substantive and inchoate offenses at sentencing, and, therefore, the conspiracy conviction was vacated.

When Massarella appeared for sentencing on January 8, 1975, the trial judge, in accordance with the provisions of the Code with respect to superseding mitigating penalties, offered him the option of being sentenced under the statutes in effect at the time his criminal acts were committed or under the Code.[5] The Code attempted to unify and organize various statutes relating to crimes and punishments. It provided for certain lesser alternative forms of punishments such as "conditional discharge"[6] and "periodic imprisonment"[7] not found in the prior statutes. It reduced the maximum penitentiary term for the offense of perjury from 14 years to 10 years but increased the possible fine from $1,000 to $10,000.[8] After conferring with his attorney, Massarella elected to be sentenced under the provisions of the Code.

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[5] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1008-2-4; *See also Ill. Rev. Stat.*, 1973, ch. 131, sec. 4

[6] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-1-4.

[7] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-7-1.

[8] *Ill. Rev. Stat.*, 1973, ch. 38, secs. 32-2, 1005-8-1.

The trial judge sentenced Massarella on the theft charge to five years' probation conditioned on his serving two of those years in periodic imprisonment; imposed a $10,000 fine; and ordered him to pay restitution to the state in the amount of $425,407. As to the perjury conviction, the judge sentenced Massarella to a penitentiary term of from one to three years and imposed a fine of $10,000. The judge also ordered that the term of periodic imprisonment for theft run concurrently with the penitentiary sentence for perjury and that any time served under periodic imprisonment be credited against the penitentiary term.

Massarella appealed the convictions and sentences to the Illinois Appellate Court, First Judicial District. That court first reversed, holding that the Illinois Attorney General, who had prosecuted the case, did not have statutory power to prosecute such offenses under Illinois law. *People v. Massarella*, 53 Ill. App. 3d 774, 368 N.E.2d 507 (1st Dist. 1977). The Illinois Supreme Court subsequently reversed and remanded for consideration of other issues which had not been decided by the appellate court. *People v. Massarella*, 72 Ill. 2d 531, 382 N.E.2d 262 (1978). On remand, the appellate court affirmed all convictions in a 26 page opinion. *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1st Dist. 1979). The Illinois Supreme Court denied Massarella's petition for leave to appeal. 81 Ill. 2d 586 (1980). This Court denied a Petition for Writ of Certiorari. 449 U.S. 1077 (1981).

Massarella then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. The district court judge denied the petition. *United States ex rel. Massarella v. Elrod, et al.*, 510 F. Supp. 1082 (N.D. Ill. 1981). The United States Court of Appeals for the Seventh Circuit,

on July 14, 1982, reversed and remanded, holding that although there was no *ex post facto* violation resulting from the extension of the statute of limitations, the reclassification of perjury under the Code meant that Massarella stood convicted of a felony for which he was subject to adverse collateral consequences. The court of appeals ordered the district court to issue the writ and to order the state to resentence Massarella under "the law in place when [the] crime occurred." *United States ex rel. Massarella v. Elrod, et al.*, 682 F.2d 688, 690 (7th Cir. 1982). Illinois law still gives Massarella the option to elect under which statute he wishes to be sentenced.

Both the petitioner and respondent filed Petitions for Rehearing *In Banc*, which were denied on September 23, 1982.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE EXTENSION OF A CRIMINAL LIMITATIONS PERIOD BEFORE IT HAS EXPIRED DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE.

Petitioner's argument amounts to this:

1. The Illinois Unified Code of Corrections, enacted after he had committed perjury, reclassified his crime from a misdemeanor to a felony.[9]
2. Because certain collateral adverse consequences attach to felony convictions which do not attach to misdemeanor convictions, the reclassification, for all purposes, violates the *ex post facto* clause (even though petitioner's sentence was well within the range of punishments under the prior misdemeanor classification).
3. The extension of the limitations period before it would have expired under the former statute was itself a result of the change in classification.
4. Therefore, the extension of the limitations period was violative of the *ex post facto* clause.

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[9] The former statute, because it allowed for alternative forms of punishment of imprisonment in a penitentiary for up to fourteen years or in some other place of confinement for up to a year, meant that perjury was classified as a misdemeanor under the Illinois Supreme Court's holdings. (*See People v. Novotny*, 41 Ill. 2d 401, 244 N.E.2d 182, 183-84 (1968). The classification was somewhat misleading because whereas misdemeanors could be prosecuted upon complaint only, if the state intended to seek a penitentiary term for perjury, it had to prosecute the defendant upon a grand jury indictment, as it did in this case. Thus, this class of penal statutes came to be called "indictable misdemeanors."

Petitioner's logic fails under this Court's holding in *Weaver v. Graham*, 450 U.S. 24, 36, n.22 (1981). There, this Court held that only the *ex post facto* portion of a new law is void. It also held that any other provisions of a statute which are not themselves *ex post facto* may remain effective.

Petitioner, by arguing that anything arising from the reclassification is an *ex post facto* violation, ignores the difference between the substantive and procedural aspects of the newer statute. The court of appeals, following the prescription of this Court in *Weaver v. Graham*, distinguished between those two aspects and held that only the substantive portion of petitioner's conviction was violative of the *ex post facto* clause.

Although respondents do not agree with the court of appeals' opinion insofar as it holds that petitioner stood convicted of a felony merely by electing after trial to be sentenced under the Illinois Unified Code of Corrections,[10] the court was nevertheless correct in making a distinction between the procedural and substantive aspects of the newer statute in determining whether both were subject to the *ex post facto* clause.

Petitioner argues that "[A]ny post-conduct change in the law which is any more burdensome to a defendant or which operates to his disadvantage—over and above sentencing considerations—is an *ex post facto* law barred by the Constitution." (Pet. at 13). This Court has already rejected that argument. In *Dobbert v. Florida*, 432 U.S. 282, 293 (1977), this Court stated, "Even though

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[10] Respondents have themselves filed a Petition for Writ of Certiorari (No. 82-811) wherein they set forth their reasons for disagreement with this portion of the court of appeals' opinion.

it may work to the disadvantage of a defendant, a procedural change is not *ex post facto.*"

Under federal law, it has commonly been accepted that limitations statutes are procedural, not substantive. *Bridges v. United States*, 346 U.S. 209, 226-27 (1953); *United States v. Obermeier*, 186 F.2d 243, 254-55 (2d Cir. 1950). It has also been held under federal law that an extension of a limitations period after commission of an offense but before expiration of the prior period is not an *ex post facto* violation. *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928); *Clements v. United States*, 266 F.2d 397, 399 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959); *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975) (dictum).

Under Illinois law, statutes of limitations have also been held to be procedural. *People v. Anderson*, 53 Ill. 2d 437, 440, 292 N.E.2d 364 (1973); *People v. Liebling*, 36 Ill. App. 3d 1073, 344 N.E.2d 520, 523 (1st Dist. 1976). The court in *Liebling* also pointed out that under Illinois law although a reclassification after commission of an offense is permissible for procedural purposes, it is not permissible for substantive purposes. 344 N.E.2d at 523. That statutory construction was disregarded by the Seventh Circuit in this case, although in an earlier case the Court had held that the Illinois statutory scheme, by its very terms, precludes constitutionally proscribed *ex post facto* laws. *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972). (See Respondents' Petition for Writ of Certiorari (No. 82-811) at 11-13).

Petitioner's arguments do not demonstrate how the extension of the statute of limitations by virtue of reclassification, when limited to that procedural purpose only, makes this case any different from *Falter v. United States* or *Clements v. United States*. A statutory provi-

sion may serve more than one function, as does the Illinois classification scheme that distinguishes between misdemeanors and felonies. The fact that the classification portion of the Unified Code of Corrections could not be applied substantively did not nullify it for all other purposes. *Cf. Buckley v. Valeo*, 424 U.S. 1, 75-82 (1976).

Petitioner's argument, at page 13 of his Petition, that the reclassification of the offense directly subjected him to a harsher penalty, is a separate question which does not deal with the issue now before this Court: the court below sided with petitioner in holding that he was subjected to enhanced punishment as a result of the reclassification, and it held that he should now be sentenced under the former statute. In addition, respondents do not agree with petitioner's statement that the prescribed punishment was actually enhanced under the newer statute. Petitioner himself chose to be sentenced under the newer statute and still claims that prerogative, for reasons which he must believe are to his advantage. (See Pet. at 16-17).[11] It is inconsistent and illogical for him to argue that the newer statute was harsher while maintaining that it is the one he preferred to be sentenced under when required to make a choice between the two.

Petitioner's arguments at pages 14 through 18 of his Petition are fallacious. After arguing the applicability of this Court's holding in *Weaver v. Graham* in the court below, he now says that that case is distinguishable from this one. (Pet. at 15). While respondents agree that *Weaver v. Graham* is not in point with the *ex post facto*

[11] The court of appeals below (682 F.2d 688, 690), as well as the district court (510 F. Supp. 1082, 1084), perceived the rationale for Massarella's electing to be sentenced under the newer statute.

issue involved in this case, they believe the court below was correct in following this Court's resentencing remedy fashioned in *Weaver*. *Cf. Lindsey v. Washington*, 301 U.S. 397 (1937); *In Re Medley*, 134 U.S. 160 (1890).[12]

Petitioner's argument that it is not now possible to sentence him under the old law is not a question that this Court should decide. *In Re Medley*, 134 U.S. at 174. But aside from that, the former statute is not repealed insofar as petitioner's right to be sentenced under it is concerned. Under *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1008-2-4 and *Ill. Rev. Stat.*, 1973, ch. 131, sec. 4, the prior law remains in effect for all prosecutions which have not reached a final adjudication. This case falls in that category even if the court of appeals' decision is not disturbed.

Petitioner asks this Court to erase his conviction for perjury simply because the newer statute permitted the State of Illinois to extend the period within which it might prosecute him from 18 months to 36 months. The fact that the statute was extended prior to its expiration as to petitioner's crime is, as far as he is concerned, beside the point. What is not evident from petitioner's present Petition is that a concomitant result of the grant-

[12] Petitioner also refers to what he says are pending state post-conviction proceedings. (Pet. at 4, n.2, and 16, n.19). His post-conviction petition was denied by the trial court, and the appellate court has dismissed his appeal. Petitioner tried to argue in those proceedings that *Weaver v. Graham* altered the law on *ex post facto* violations thereby nullifying the Illinois Appellate Court's decision in his case, *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1st Dist. 1979)—an obvious fallacy. He also argued that his election to be sentenced under the newer statute was not knowingly and intelligently made. The trial court rejected the latter argument after Massarella's counsel told the judge that his client was not willing to be resentenced under the former statute. Thus, there is no failure-to-exhaust issue in this case.

ing of his request would be that he could then challenge his theft conviction as well. Along with his perjury indictment, petitioner was jointly tried and convicted for theft of Illinois State motor fuel taxes in the amount of $425,407. Although that conviction has been upheld in these habeas corpus proceedings, it remains the subject of a subsequent challenge by petitioner if he were able to argue hereafter that the jury heard evidence of his acts of perjury which it would not have heard had the trial court dismissed the perjury charge.[13] That is why petitioner finds the remedy fashioned by the court of appeals allowing the state to resentence him under the former perjury statute unpalatable.

With these considerations in mind, respondents point out that petitioner has not articulated one cogent reason why he should not be sentenced under either of the two statutes in question. His arguments simply do not demonstrate that he was the victim of "arbitrary and oppressive legislation." *Beazell v. Ohio*, 269 U.S. 167, 171 (1925). The *ex post facto* clause was not intended to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. *Beazell*, 269 U.S. at 171; *Dobbert v. Florida*, 432 U.S. at 293.

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[13] This is precisely what petitioner argued in his first Petition for Writ of Certiorari to this Court. (Case No. 80-304; *cert denied, Massarella v. Illinois*, 449 U.S. 1077 (1981)).

CONCLUSION

For the foregoing reasons, respondents pray that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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